BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

FACTS

A summary judgment was granted on the ground the complaint did not state a cause of action.

The major oil companies above named, among others, entered into a conspiracy (Complaint, Par. 22, R. 71-72) which resulted in Petitioners paying 2¼¢ more per gallon than they would otherwise have paid for gasoline purchased from Defendant Phillips Petroleum Company (Par. 19, R. 71, 72; and Par. 26, R. 74, Petitioners' Complaint).

The Defendants were found guilty of the conspiracy in the so-called Madison Oil cases. (*U. S. vs. Socony-Vacuum,* 310 U. S. 150, 84 L. ed. 1129.)

At a pre-trial hearing Petitioners' counsel conceded that the gasoline purchased at the excessive price was later sold "in the ordinary course of business" (R. 113).

With the Record in this state, consisting *only* of the *complaint* and this *statement,* the District Court granted Respondents' motion for summary judgment.

The District Court did this because it was of the opinion that the "mere fact" of an "illegal exaction" or overcharge on the part of the oil companies, due to the conspiracy, was not sufficient to create a liability (R. 120).

The District Court was of the opinion also that because the gasoline had been sold by Petitioners "in the ordinary course of business," they could not recover the illegal exaction made of them in the first instance by the conspirators (R. 118-119).

The Circuit Court of Appeals stated the facts as follows:

"Defendants, beginning in 1932 and continuously

thereafter, conspired together to raise and did raise the spot market tank car prices of gasoline in the Mid-Western area, which included gasoline sold to plaintiffs, by approximately 2¼¢ per gallon higher than it would have been had not the price been artificially set. * * *" (R. 136-137).

"It is alleged that the exaction *damaged* plaintiffs *by a sum equal to 2¼¢ per gallon* purchased during the life of their contract with the Phillips Petroleum Company. * * *" (R. 137).

Judgment was entered on motion of Defendants for summary judgment, on the ground that the complaint did not state facts sufficient to constitute a cause of action (R. 142).

Clark Oil Co., et al., vs. Phillips Pet. Co., 148 Fed. (2d) 580 (R. 136).

The Petitioners contended:

(1) That the illegal exaction was a tort and that a cause of action arose in their favor immediately when the illegal exaction or overcharge was made.

(2) That the fact that the gasoline was later sold in the ordinary course of business was of no concern to the conspirators.

QUESTIONS PRESENTED NEVER DIRECTLY DECIDED BY THIS COURT

While the decisions of this Court in similar cases clearly indicate the error of the Circuit Court of Appeals and the District Court, the precise questions presented have never been decided by this Court.

TWO CIRCUIT COURTS OF APPEAL DIFFER

The Circuit Court of Appeals for the Eighth Circuit in the present case held that the "plaintiffs' right of recovery from defendants is dependent upon both the buying and selling prices." (Opinion, Eighth Circuit, R. 139.)

The Circuit Court of Appeals for the Eighth Circuit in *Straus vs. Victor Talking Machine Co.*, 297 Fed. 791, 803, held that whether "plaintiffs sold to their customers at a profit or a loss becomes immaterial in this case" in view of the fact that the plaintiffs had to purchase goods in a closed market created by the conspirators.

DECISIONS RELIED ON BY PETITIONERS

Complaint to Be Liberally Construed

In a case arising under the Sherman Anti-Trust Act this Court specifically said that the complaint should be liberally construed.

Stevens vs. Foster, 311 U. S. 255, 61 S. Ct. 210, 85 L. ed. 173.

Sherman Act to Be Liberally Construed

There is no question but that the Sherman Act is to be liberally construed to effectuate its humane purpose.

See *Ramsey vs. Associated Billposters*, 260 U. S. 501, 43 S. Ct. 167, 67 L. ed. 368.

And it is true that the Act was designed to protect the public against the evils incident to monopolies and combinations in restraint of trade.

Paramount Famous Lasky Corp. vs. U. S. A., 282 U. S. 30, 75 L. ed. 145.

The Statutes

The Sherman Act provides in Section 7—

> "Any person who shall be injured in his business or property * * * by reason of anything forbidden or declared to be unlawful by this Act * * * shall recover three-fold the damages by him sustained."
>
> 26 Statutes 209, 15 U. S. C. A., §15.

The Clayton Act by Section 4 provides that "any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust laws shall recover three-fold the damages by him sustained."

38 Statutes 71, U. S. C. A. 15, Subdivision 15.

Immediate Victim to Be Protected

This Court has said:

> "The immediate victim of a violation of the Sherman Law should not be denied redress * * * when mulcted by a violator."
>
> *State of Georgia vs. Evans*, 316 U. S. 159, 86 L. ed. 1346, 62 S. Ct. 972.

Cases Most Nearly in Point

The complaint alleges an illegal exaction from the jobber of 2¼¢ per gallon (Par. 19, R. 71, 72, and Par. 26, R. 94). The illegal exaction was made because of the conspiracy. In this proceeding the allegations of the complaint must be taken as true.

Illegal Exaction a Tort

> "If the defendants exacted from them an unlawful charge *the exaction was a tort* for which the plaintiffs were entitled, as for other torts, to compensation from the wrongdoer."
>
> *Adams vs. Mills*, 286 U. S. 407, 76 L. ed. 1191.

Accrual of Cause of Action

"In contemplation of law the claim for damages arose *at the time the extra charge was paid.*"
Adams vs. Mills, 286 U. S. 407, 76 L. ed. 1191.

Plaintiffs Entitled to Purchase in a Free Market

In *Straus vs. Victor Talking Machine Company,* 297 Fed. 791, Justice Mayer speaking for the Circuit Court of Appeals of the Second Circuit said:

> "Plaintiffs had the right *to purchase* Victor records *in a free market.* This right was *invaded* by defendants and plaintiffs were forced to buy in a *closed market created* and held *by the illegal combination.*" (297 Fed. 791, 799.)

This is the situation in the case at bar.

Petitioners had a right to buy gasoline in a free market; they could not do it. There was a closed market; a conspirator's market; a market where higher prices were charged.

The trial court in the Straus case held that under the facts an issue was presented for the jury on the question of damages, the trial court charging the jury as follows:

> "Now, what is the nature of those damages? If a man can go out in *an open and free market* and buy goods at a certain price, and then, because the market is closed to him illegally and he is *compelled to pay more,* his damage is the *difference* between what he would have paid in an *open* and *free* market and what he *actually did pay* under the conditions of the *illegally closed market.*"
> *Straus vs. Victor Talking Machine Co., supra.*

The Court in his charge further said:

> "Macy's were compelled to pay higher prices *if they wanted to get goods.* They had a legal right to get

goods; they had a legal right to go out and buy as many goods as they could or wanted to, and they are entitled to recover, as their damages, the *difference* between what they would have paid for such of the goods that they actually got, as they could have gotten in the open market, *and what they did pay.*"

Straus vs. Victor, 297 Fed. 801.

Not an Action for Profits

We quote from the Straus case:

"In the case at bar, plaintiffs have not sued for damages due to *loss of profits.* Their position is that they were *entitled to buy goods in a free market;* that they were prevented from doing this by defendants' illegal combination; that they were *forced,* therefore, *to buy in the market which defendants had created,* and were thus *compelled to pay more* for their goods than the price which in that market was the fair and reasonable price established by defendants themselves."

Straus vs. Victor, 297 Fed. 802-3.

To again quote from the Straus case:

"Plaintiffs contend, and rightly, that they *were not forced to sue for damages for loss of profits, and thus run the risk of no recovery,* because, plainly, the restrictive arrangement prior to May 1, 1914, furnished no standard of comparison with sales made, or profits increased or lost, by plaintiffs during the period thereafter, when they could sell as they pleased. *They contended for a rule of damage which seeks the proximate cause of damage and the proximate result occasioned by that cause.*"

Straus vs. Victor, 297 Fed. 803.

As to the payment required, in the Straus case, the Court again used language applicable to the situation existing in the case at bar:

"Plaintiffs were compelled to pay more than this reasonable price. Why? Manifestly because the *illegal combination forced them so to do in order to carry on*

the requirements of their business. Whether, then, plaintiffs sold to their customers at a *profit* or *loss becomes immaterial in this case."*

Straus vs. Victor, 297 Fed. 803.

Overcharge—Liability

That conspirators are liable where a purchaser is overcharged because of a conspiracy has been settled by many decisions of this Court.

See *Chattanooga Foundry vs. City of Atlanta,* 203 U. S. 390, 27 S. Ct. 65, 51 L. ed. 241.

Adams vs. Mills, 286 U. S. 397, 52 S. Ct. 589, 76 L. ed. 1184.

Resold in the Ordinary Course of Business

At a pre-trial hearing the following occurred:

"Mr. Searls: Is it correct to say that your claim of damages is based on gasoline that was bought and was in fact resold *in the ordinary course of business?*

Mr. Michel: Yes.

Mr. Searls: Well, I think that covers it, your Honor.

The Court: I think so" (R. 119-120).

The Record does not show that the Petitioners actually received their money back or made a profit, but we go beyond that point. Petitioners contend that on the question of resale or getting it back, the case is *controlled* by *Southern Pacific vs. Darnell,* 245 U. S. 533, 62 L. ed. 455.

The Darnell case involved an illegal exaction or an overcharge. Plaintiffs were able to get the overcharge back from their customers but the Court held this constituted no defense to the original wrong.

Mr. Justice Holmes writing the opinion in the Darnell case, said that the law *"does not inquire into later events,"* citing *Olds vs. Mapes-Reeve Construction Co.,* 177 Mass. 41-

44, 58 N. E. 478, an early Massachusetts case.

Justice Holmes went squarely into this "got it back" or "passed it on" theory of damages, saying:

> "The *only question* before us is that at which we have hinted; *whether the fact that the plaintiffs were able to pass on the damage* that they *sustained in the first instance* by paying the *unreasonable charge,* and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. *The answer is not difficult. The general tendency of the law, in regard to damages, at least, is not to go beyond the first step.*"
>
> *Southern Pac. vs. Darnell,* 245 U. S. 533, 62 L. ed. 455.

Justice Holmes further said, in pointing out the logic of the conclusion arrived at, that the law did not go beyond the first step:

> "As it does not attribute *remote consequences* to a *defendant,* so it *holds him liable* if *proximately the plaintiff has suffered a loss.* The plaintiffs suffered losses to the amount of the verdict *when they paid.* Their *claim accrued at once* in the theory of the law, and it *does not inquire into later events. Olds vs. Mapes-Reeve Constr. Co.,* 177 Mass. 41, 44, 58 N. E. 478."
>
> *Southern Pac. vs. Darnell,* 245 U. S. 534, 62 L. ed. 455.

Conspirators Should Not Keep Their Illegal Gains

Justice Holmes in the Darnell case, *supra,* further said of the one guilty of making the illegal exaction: "The carrier *ought not to be allowed to retain his illegal profit.*"

It should here be noted that the decision of Mr. Justice Holmes was *based on an old Massachusetts case, Olds vs. Mapes-Reeve Construction Co.,* 177 Mass. 41, 58 N. E. 478.

The Mapes case was one involving a *breach of contract* for the construction of a building. This is important because the Circuit Court was misled into the idea that while the

"got it back" or "sold in the ordinary course of business" defense could *not* be asserted under the Interstate Commerce Act that it *could* be asserted under the Sherman Act. But the Darnell case *was not based on any rate decision,* but on an ordinary simple *building contract.*

In a later case Mr. Justice Brandeis quoted the contentions of the Defendants, saying:

> "The defendants contend that, *even if the exaction of the extra 25-cent charge was unlawful,* the *plaintiffs* are *not* entitled to recover. The argument is that under Section 8 of the Interstate Commerce Act the liability of the common carrier is 'to the *person* or *persons injured thereby* for the full amount of damages sustained in consequence of any such violation'; that before any party can recover under the act he must show, *not merely the wrong of the carrier, but that the wrong has in fact* operated to the plaintiff's *injury.*"
>
> *Adams vs. Mills,* 286 U. S. 406, 76 L. ed. 1191.

Justice Brandeis further set forth the contentions of the Defendants, the wrongdoers in that case, saying:

> "That *here* the award is to the plaintiffs *individually, not as agents* for the *shippers;* and that *individually* they suffered *no pecuniary loss,* since they paid the charges *as commission merchants* and *reimbursed themselves for these, as for other, charges* from the proceeds *of the sale* of livestock, remitting to their principals only the *balance* remaining. We think the argument *unsound,* for the reasons, among others, stated in *Southern Pacific vs. Darnell-Taenzer Lumber Co.,* 245 U. S. 531, 38 S. Ct. 186, 62 L. ed. 451."
>
> *Adams vs. Mills, supra.*

Justice Brandeis met the reimbursement defense head on.

> "Neither the *fact of subsequent reimbursement* by the plaintiffs from funds of the shippers nor the *disposition* which may hereafter be made of the damages recovered is *of any concern to the wrongdoers.*"
>
> *Adams vs. Mills, supra.*

The Adams case is the complete answer to the contention of the wrongdoers in the present case on the "ordinary course of business" theory.

The Supreme Court in the Adams case clearly held that the Plaintiffs suffered injury "*when they paid*" the illegal exaction.

The Supreme Court definitely said that a right of recovery existed in favor of the parties who "*in the first instance*" paid the unlawful charge. We quote:

> "The plaintiffs have suffered injury within the meaning of Section 8 of the Interstate Commerce Act; and the purpose of that section would be *defeated* if the *tortfeasors were permitted to escape reparation* by a plea that the *ultimate incidence* of the injury *was not* upon those who were compelled *in the first instance to pay the unlawful charge.*"
>
> *Adams vs. Mills*, 286 U. S. 408, 76 L. ed. 1192.

To the same effect is *Olliphant vs. Florida East Coast Ferry Co.*, 4 Fed. Supp. 288.

See also *Queen Ins. Co. of America vs. Globe & Rutgers*, 44 S. Ct. 175, 263 U. S. 487, 68 L. ed. 402, in which Mr. Justice Holmes said that we "generally are to *stop our inquiries with the cause nearest to the loss.*"

Where Plaintiffs were overcharged they were "entitled to reparation; that is, to be made whole—to be compensated for a loss because of an *illegal* and unreasonable *exaction.*"

> *Mills vs. Lehigh Valley Ry. Co.*, 238 U. S. 482, 35 S. Ct. 888, 892, 59 L. ed. 1414, 1418.

The Mills case holds that an overcharge is in and of itself a damage. (*Mills vs. Lehigh Valley*, 238 U. S. 481, 35 S. Ct. 891, 59 L. ed. 1418.)

Mr. Justice Pitney in a dissenting opinion in *Pennsylvania Railway Co. vs. Int. Coal Mining Co.*, 230 U. S. 214, 33 S. Ct. 903, 57 L. ed. 1458, used this language:

> "But Congress, I submit, never intended to impose upon the injured party the impossible task of tracing his ultimate losses to this or that shipment."

It is interesting to note in the opinion of Justice Pitney that he said: "At the common law a shipper who had been charged an unreasonable rate could recover back the excess." (*Pa. Ry. Co. vs. Int. Coal Min. Co.*, 230 U. S. 237-238, 57 L. ed. 1467.)

Mr. Justice Pitney dealt with the "got it back" or "sold in the ordinary course of business" theory. He said:

> "If complainants were obliged to follow every transaction to its ultimate result, and to trace out *the exact commercial effect* of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them."
>
> *Pa. Ry. Co. vs. Int. Coal Min. Co.*, 230 U. S. 241, 33 S. Ct. 914, 57 L. ed. 1469.

Again Justice Pitney used language which is pertinent in the present case:

> "Certainly *these defendants are not entitled to this money* which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount *because the complainants themselves may have obtained some portion* of this sum from the *consumer* of the commodity transported."
>
> *Pa. Ry. Co. vs. Int. Coal Min. Co.*, 230 U. S. 242, 33 S. Ct. 914, 57 L. ed. 1469.

Respondents' Claim Not Based Wholly on "Rate Cases"

The Circuit Court of Appeals held Plaintiff could not recover, holding that the decisions of the Supreme Court of the United States allowing recovery in the first instance were inapplicable because they were "rate cases." The Circuit Court also held that the Darnell case as to reimbursement was not in point because it was a rate case (148 Fed. (2d)

580) (R. 141-142). The Court *overlooked* the fact that Justice Holmes *based his decision* on the Mapes case, a *building contract* case. (See *Southern Pac. vs. Darnell*, 245 U. S. 531, 38 S. Ct. 186, 62 L. ed. 451.)

The Circuit Court held that a "different rule" existed in rate cases under the Interstate Commerce Act, but the Supreme Court of the United States in an overcharge case, *not* under the Interstate Commerce Act, but under the Sherman Anti-Trust Act, held that there *could be a recovery where there was an overcharge due to a conspiracy.*

In that case the Court said:

> "The plaintiffs *alleged* a *charge over a reasonable rate* and the *amount* of it. If the charge be true that *more than* a reasonable rate *was secured by the combination* the *excess* over what was reasonable was *an element of injury.*"
>
> *Thomsen vs. Cayser*, 243 U. S. 66, 37 S. Ct. 353, 61 L. ed. 597.

In the Cayser case Mr. Justice McKenna, who wrote the opinion, further said:

> "Besides, plaintiffs *alleged an overcharge*, and the verdict of the jury was *for its amount* and interest."
>
> *Thomsen vs. Cayser, supra.*

Pecuniary Loss Alleged

A pecuniary loss was alleged in the complaint (Par. 19, R. 71-72). The illegal exaction or overcharge of 2¼¢ is definitely set forth in the complaint (Complaint, Par. 19, R. 71-72; Par. 26, R. 74; Par. 6, R. 66).

Where there is a payment or an overcharge which "arises out of the *wrongful exaction* from the shipper," such wrongful exaction in and of itself constitutes a pecuniary loss.

> *Louisville & Nashville Ry. vs. Sloss, etc.*, 269 U. S. 217, 46 S. Ct. 73, 70 L. ed. 242.

We quote further from the Sloss case. The shipper "was damaged to the extent of the *difference* between the charges *paid* and those that *would have accrued at the rates found reasonable.*"

Pecuniary loss was shown by the mere illegal exaction, or as the Court said, by "the amount of the excess exacted."

Louisville & Nashville Ry. vs. Sloss, etc., 269 U. S. 235.

The Errors of the Circuit Court

The Circuit Court of Appeals said:

> "Plaintiffs are seeking, not compensation for damages suffered by defendant's illegal acts, but profits because of said acts" (148 Fed. (2d) 580) (R. 139).

This is not correct. Plaintiffs are seeking a recovery for the overcharge as alleged in the complaint and as set forth by the Circuit Court of Appeals in its opinion (148 Fed. (2d) 580), quotation on page 581, wherein the Court said that Plaintiffs sought to recover damages because the price was "approximately 2¼¢ per gallon higher than it would have been had not the price been artificially set" (R. 136-137).

A damage arose when the illegal exaction was paid. Suppose the gas had been destroyed en route! The jobbers would have lost the extra 2¼¢ per gallon. Then there could have been no "ordinary course of business" sales as a defense. Extra capital, perhaps interest and carrying charges could be involved because of the extra and illegal charge made in the first instance. These considerations clearly indicate an *original liability.* Once we reach *this* conclusion, liability follows here, because *the resale question is of no concern to the wrongdoers* under the Darnell and Adams cases.

The Circuit Court said that the law does not contemplate "that damages shall be recoverable by two where only one

has suffered injury." No such question was involved, but this goes back to the contention that ultimate consumers might recover but that the Plaintiffs were not entitled to recover from the conspirators because the gasoline was sold in the usual course of business.

The *Darnell vs. Adams* and *Southern Pac. vs. Darnell*, cases, *supra*, both hold that what subsequently becomes of the recovery or the fact of later reimbursement is of no "concern to the wrongdoer."

Again the Circuit Court says:

> "Plaintiffs' right to recover from Defendants is dependent upon both the buying and selling prices" (R. 139).

It *does not so appear from the complaint*, and the statement above made is contrary to the rule laid down by this Court in the following cases:

Chattanooga Foundry vs. City of Atlanta, 203 U. S. 390, 27 S. Ct. 65, 51 L. ed. 241.

Thomsen vs. Cayser, 243 U. S. 66, 37 S. Ct. 353, 61 L. ed. 597.

Southern Pac. vs. Darnell, 245 U. S. 531, 38 S. Ct. 186, 62 L. ed. 451.

Adams vs. Mills, 286 U. S. 397, 52 S. Ct. 589, 76 L. ed. 1184.

And it is contrary to the holding of the Circuit Court of the Second Circuit in *Straus vs. Victor Talking Machine Co.*, *supra*.

The Circuit Court further says that the Darnell and Adams cases were tariff cases "to recover freight overcharges."

Adams vs. Mills was an action against railroads and stockyards companies to recover an extra charge of 25¢ a car *for unloading livestock*.

The Circuit Court was of the opinion that the Adams and

Darnell cases were not in point because published rate tariffs were involved in those cases, but *Adams vs. Mills* involved an extra charge of 25¢ a car for unloading livestock, not involved in a published tariff. In the Adams case the lower court "rested its decision on the ground that the exaction of the extra 25¢ charge was *a wrongful practice,*" and this Court said:

> "In contemplation of law the claim for damages arose at the time the extra charge was paid."
>
> *Adams vs. Mills*, 286 U. S. 407, 76 L. ed. 1191.

Certainly under these facts the question of a published tariff was not involved.

The same principle is involved where there is an overcharge, whether there be a violation of a tariff or whether the overcharge be the result of a conspiracy.

The Circuit Court of Appeals said that the right to recover under the Interstate Commerce Act "bears little analogy to the right to recover treble damages under the anti-trust laws."

Statutes Substantially the Same

The Interstate Commerce Act provides for a recovery

> "to the person or persons injured thereby for the *full amount* of damages sustained in consequence of any such violation."
>
> U. S. C. A., Title 49, Section 8.

The Clayton Act by Section 4 provides that "any person who shall be injured in his business or property by reason of anything forbidden in the Anti-trust laws shall recover *three-fold the damages* by him sustained."

38 Statutes 71, U. S. C. A. 15, Subdivision 15.

The Circuit Court also said that there could not be a recovery unless "damages in some amount susceptible of

expression in figures resulted" (148 Fed. (2d) 580-583), but in the Court's opinion on page 581 (R. 141-142) it is said that the complaint alleges damages of 2¼¢ per gallon for 6,273,660 gallons of gasoline which Plaintiffs purchased. It is a *mere mathematical proposition* to figure out the damages.

The Circuit Court, quoting from *Keogh vs. C. & N. W. Ry. Co.*, 260 U. S. 155, 43 S. Ct. 47, 67 L. ed. 183, as to damages, said:

> "They cannot be supplied by conjecture. To make proof of such fact would be impossible in the case before us" (R. 141).

This statement is *not consistent with the statement just referred to and made on page 581 of the opinion of the Circuit Court* (R. 136-137), wherein the damage, according to the complaint, is *definitely set at 2¼¢ per gallon* for the gasoline purchased.

Furthermore, this statement is wholly at variance with the rule laid down by this Court as to liberality of damages in anti-trust cases.

> See *Story Parchment vs. Paterson Parchment Paper Co.*, 283 U. S. 555, 51 S. Ct. 248, 75 L. ed. 544;
>
> *Stevens vs. Foster*, 311 U. S. 255, 61 S. Ct. 210, 85 L. ed. 173 (as to liberal construction of the complaint).

The Circuit Court further says that in an action under the Clayton Act the damages are "not fixed by statutory provisions, but the damages are unliquidated" (148 Fed. (2d) 583).

Again on the same page the Circuit Court says:

> "As the action to recover treble damages is *not for the amount of the overcharge exacted*, the 'illegal exaction theory' of the freight rate cases is not applicable."

But the action *is* to recover damages *for the amount of the overcharge*. The Circuit Court itself quoted from the com-

plaint on page 581 of the opinion in 148 Fed. (2d) (R. 136-137), stating the claim to be for a recovery of the excess charge of 2¼¢ per gallon.

The Keogh Case

We give a heading to the case of *Keogh vs. C. & N. W. Ry. Co.*, 260 U. S. 155, 43 S. Ct. 47, 67 L. ed. 183, because the District Court and the Circuit Court of Appeals (R. 141) relied on this case. It is no more in point than the Book of Genesis. In the Keogh case the Plaintiff's claim *was based upon a legal rate, not a tort* or an illegal exaction, *but a rate duly promulgated by the Interstate Commerce Commission* and, very significantly, the opinion in the Keogh case was written by Mr. Justice Brandeis. It was decided on November 13, *1922*. The same Mr. Justice Brandeis wrote the opinion in *Adams vs. Mills,* decided *ten years later,* May 23, *1932*.

In *Adams vs. Mills,* Mr. Justice Brandeis upheld the right of recovery for *an illegal exaction*. In his opinion in the Adams case *he did not even mention the Keogh case*.

In the Keogh case, which the Circuit Court of Appeals relied upon, the action *was based upon a legal rate*. The case was so clearly *not in point* where there was *an illegal exaction* that Justice Brandeis *did not even mention it in his opinion* in *Adams vs. Mills,* but still the Circuit Court relied upon the Keogh case, based upon *a legal rate*.

Thus we see that the Circuit Court has relied upon *one* decision of this Court as controlling, which is clearly not in point and has failed to follow controlling decisions. There should be a clarifying opinion in the present case. Many cases such as the present are pending and more will arise under the Anti-Trust Act.

The Cayser Case

And over and above all this, the Circuit Court, while relying upon the Keogh case, not in point as to facts, *failed to mention Thomsen vs. Cayser, supra,* most nearly in point as to facts and clearly in point on principle.

The leading overcharge case decided by the Supreme Court of the United States under the Sherman Act (not the Interstate Commerce Act) is *Thomsen vs. Cayser, supra.*

Thomsen vs. Cayser was an overcharge case. It involved an overcharge by ship owners. The Supreme Court held that *the payment of the excessive charge in the first instance* constituted a pecuniary loss.

Mr. Justice McKenna, speaking for the Court, said:

> "The plaintiffs *alleged* a charge *over* a reasonable rate and the *amount* of it. If the charge be true that *more* than a *reasonable* rate was secured by the combination, the *excess* over what was reasonable *was an element of injury.*"
>
> *Thomsen vs. Cayser,* 243 U. S. 66, 37 S. Ct. 353, 61 L. ed. 597.

And it should be remembered that the overcharge constitutes a pecuniary loss giving rise to a cause of action "when they paid." *Adams vs. Mills, supra.*

The Case Is Not One Involving a "Published Tariff"

Pursue *Thomsen vs. Cayser* further and we find that Justice McKenna said: "Besides, plaintiffs *alleged an overcharge,* and the *verdict* of the jury was *for its amount* and interest."

Thomsen vs. Cayser, supra, the leading case in this Court is, however, *ignored by the Circuit Court of Appeals.* An anemic distinction is made of the Darnell and Adams cases. But the Circuit Court does not even mention *Thomsen vs. Cayser.*

Conspirators Not to Be Favored

And it should not be forgotten that these conspirators should not occupy any favored seat in the Temple of Justice. They conspired to and did violate the laws of their country.

As stated by Justice Hughes, in speaking of a guilty party, he comes before the Court and "stands as a convicted felon" and he is "*subject to all the disabilities flowing* from such a judgment."

Berman vs. U. S., 302 U. S. 211, 58 S. Ct. 164, 82 L. ed. 204.

Certainly one of the disabilities or liabilities is the *repayment of the illegal exactions* made from purchasers.

What about the illegal exaction? The *oil companies received the extra 2¼¢ per gallon.* They *have never returned it to any consumers.* Is the law such that these conspirators can *keep their gains* and cannot be made to repay this illegal exaction because, perchance, an ultimate consumer has a right of recovery? The Circuit Court said there could not be two recoveries. But if a consumer brought suit, would not the conspirators say they were *not in privity* with the sellers? But if consumers can later recover from the jobbers this, as said in *Adams vs. Mills*, is of no concern to the wrongdoers.

The fact that an ultimate consumer may have a claim against the jobber is no defense to the conspirators. Mr. Justice Holmes and Mr. Justice Brandeis have said that the law does not go beyond the first step, and that the matter of subsequent reimbursement is not of any concern to the wrongdoers.

The conspirators in the Madison Oil cases have escaped unscathed. They *have kept their ill-gotten gains.*

The decision of the Circuit Court of Appeals *is not right.* It permits wrongdoers to keep their ill-gotten gains on the

theory that the decisions in the so-called rate cases are not applicable because they were brought under the Interstate Commerce Act. But the Circuit Court failed to at all consider *Thomsen vs. Cayser,* which was brought under the Sherman Act. This case was urged upon the court below in the briefs and in the oral argument. The *opinion of the Circuit Court does not even mention it.*

The decision of the Circuit Court is clearly wrong and should not stand. It relies on the Keogh case and overlooks the Cayser case. It slides by *Adams vs. Mills* and the Darnell case. It is contrary to *Straus vs. Victor Talking Machine Company* (C. C. A., 2nd Cir., *supra*).

The precise questions here involved have never been determined. With Sherman Anti-Trust cases being so frequently before the lower courts, the questions should be determined by this Court.

Respectfully submitted,

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